INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Alpha Steamship Corp. v. *Cain*, 281 U.S. 642	7
Bain v. *Sandusky Transportation Co.*, 60 Fed. 912	9
Blackheath, The, 195 U.S. 361	9
Cleveland Terminal R.R. Co. v. *Cleveland Steamship Co.*, 208 U.S. 316	9
Cosmopolitan Co. v. *McAllister*, 337 U.S. 783	6
Jamison v. *Encarnacion*, 281 U.S. 635	7, 8
Kamara v. *S. Livanos & Co.*, 97 F. Supp. 435	9
Martin v. *West*, 222 U.S. 191	9
O'Donnell v. *Great Lakes Co.*, 318 U.S. 36	9, 10, 11
Plymouth, The, 3 Wall. 20	9
Smith & Son v. *Taylor*, 276 U.S. 179	9
Strika v. *Netherlands Ministry of Traffic*, 185 F. 2d 555	11
Thomas v. *Lane* (1834) (1 Cir.) 2 Sumner 1, Fed. Cas. No. 13,902	9
Troy, The, 208 U.S. 321	9
United States v. *Matson Nav. Co.*, 201 F. 2d 610	11

Statutes:

Admiralty Extension Act of June 19, 1948, 62 Stat. 496, 46 S.C. (Supp. V) 740	11
Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, Section 1	3, 6, 7
Jones Act, The (Section 33 of the Merchant Marine Act of 1920), 41 Stat. 1007, 46 U.S.C. 688	2, 6
Suits in Admiralty Act, Section 2, 41 Stat. 525, 46 U.S.C. 742	3, 6
28 U.S.C. 2680(h)	11
War Shipping Administration (Clarification) Act, The, of March 24, 1943, Section 1, 57 Stat. 45, 50 U.S.C. App. 1291	6

Miscellaneous:

S. Rep. No. 1593, 80th Cong., 2d Sess.	11

APR 21 1954

205382

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 699

ANTHONY FORGIONE AND SALVATORE NICASTRO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Tr. 12a-23a) is not reported. The *per curiam* opinions of the Court of Appeals for the Third Circuit are reported at 202 F. 2d 249.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1953. A petition for rehear-

ing was denied on March 5, 1953. The petition for a writ of certiorari was filed on April 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an action under the Jones Act may be maintained to recover damages for the alleged false arrest and imprisonment of petitioners.

2. Whether an alleged arrest and false imprisonment consummated on land is a maritime tort within the admiralty jurisdiction.

STATUTES INVOLVED

The Jones Act (Section 33 of the Merchant Marine Act of 1920), 41 Stat. 1007, 46 U.S.C. 688, provides in pertinent part as follows:

> That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *

The scope of an employer's liability under the Jones Act is defined in Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, which provides in pertinent part as follows:

> That every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, * * *.

Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742, provides in part as follows:

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. * * *

STATEMENT

Petitioners were employed as seamen aboard the *S.S. George Whitefield,* a merchant vessel owned and operated by the United States, and husbanded under a general agency agreement by a private cor-

poration. On January 22, 1946, while petitioners were on shore leave, during the time the vessel was lying in port at Bari, Italy, the ship's master and another crewman complained to the military police on shore and caused petitioners' arrest and confinement. Petitioners remained in the custody of the military authorities until January 29, 1946, after the *S.S. George Whitefield* had taken on a cargo of military supplies and resumed its voyage. They were released to the custody of representatives of the War Shipping Administration and eventually repatriated to the United States. (Slip Op. 1-2.)[1]

Upon their return, petitioners filed libels *in personam* against the United States, as operator of the vessel, wherein they sought compensatory and punitive damages for what they alleged to have been their unlawful arrest and imprisonment at Bari, Italy, maliciously procured by the ship's master acting as an agent of the United States and within the scope of his employment.[2] (Tr. 1a-5a).

The factual basis for the libels being identical, the cases were consolidated for trial by the District Court, which, after a hearing on the merits, concluded (Tr. 22a-23a) that petitioners had violated military and naval law; that their arrests were lawful, based upon good cause and procured without malice. Accordingly, a final decree was entered

---

[1] Other than the transcript, the record is not paginated seriatim.

[2] The libels indicated a claim based upon malicious prosecution but were treated in the District Court and Court of Appeals as claims for false arrest and imprisonment.

awarding judgment for the United States (Tr. 24a).

The Court of Appeals affirmed, but *sua sponte* held that the District Court was without jurisdiction of the cases either under the Jones Act, *supra* p. 2, or under the court's general maritime jurisdiction. The Jones Act, the court held, was unavailable to petitioners for the reason that the alleged false arrest and imprisonment of which petitioners complained were not "negligence" within the meaning of the Jones Act and the Federal Employers' Liability Act, *supra* p. 3, and further, that the alleged wrongs were not maritime torts and therefore not cognizable in admiralty. Thus, the court concluded that since proceedings in admiralty could not have been maintained by petitioners had the vessel been privately owned or operated, they were not maintainable against the United States under the Suits in Admiralty Act, *supra* p. 3. (Slip Op. 1-5.)

ARGUMENT

The Court of Appeals, in affirming the judgment of the District Court, was clearly warranted in holding that petitioners could not have proceeded in admiralty against a private respondent on claims of the character here involved, and that the District Court was, therefore, without jurisdiction to entertain the libels filed against the United States in these cases, where it was the operator of the vessel. [3]

[3] As noted above (p. 4), the District Court conducted a full hearing on the merits of petitioners' claims and concluded that petitioners had not sustained "their burden of proving either a cause of action for false imprisonment or for malicious prosecution" (Tr. 22a).

1. Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 742, *supra,* p. 3, permits libels *in personam* to be brought against the United States in cases where a proceeding in admiralty could be maintained had the vessel been privately owned or operated. The Jones Act (Section 33 of the Merchant Marine Act of 1920), 41 Stat. 1007, 46 U. S. C. 688, *supra,* p. 2, modified the prior maritime law of the United States by giving to seamen who suffer personal injury or death in the course of their employment through the negligence of their employers the right, at their election, to maintain an action for damages in a manner similar to that theretofore afforded railway employees by the Federal Employers' Liability Act, Section 1 *et seq.,* 35 Stat. 65, 45 U. S. C. 51 *et seq., supra,* p. 3.[4] Where the United States is the operator of the vessel, the rights given to seamen by the Jones Act may be enforced by libels *in personam* against the United States under the Suits in Admiralty Act, Section 2, 41 Stat. 525, 46 U. S. C. 742, "in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained * * *." Thus, the issue whether petitioners' actions are maintainable against the United States turns on the question whether the proceedings in admiralty could have

[4] The War Shipping Administration (Clarification) Act of March 24, 1943, Section 1, 57 Stat. 45-46, 50 U. S. C. App. 1291, extended the rights of seamen on privately owned and operated vessels to seamen employed through the War Shipping Administration. See *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783.

been maintained had the vessel been privately owned or operated.

The liability of a vessel owner under the Jones Act, which incorporates by reference the provisions of the Federal Employers' Liability Act, arises from injury or death resulting "in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier * * *." 45 U.S.C. 51 (emphasis supplied). Negligent death or injury is thus the test of an employer's liability and while, as this Court has pointed out,[5] " 'negligence' is a word of broad significance and may not readily be defined with accuracy" it would be stretching the term beyond reason or necessity to hold, as petitioners urge, that the alleged false arrest and imprisonment of which they complain were "negligence" within the meaning of that term as used in the Federal Employers' Liability Act. As the court below stated (Slip Op. p. 4), "false arrest and false imprisonment * * * consist of arrest or restraint without adequate legal justification and are utterly unrelated to negligence."

Petitioners urge that since this Court, in *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, held that the term "negligence" as used in the Federal Employers' Liability Act (incorporated in the Jones Act) includes assaults, it necessarily follows that that term also includes false arrest and imprisonment. The interpretation for which petitioners contend would not only bring within the meaning

[5] *Jamison* v. *Encarnacion*, 281 U.S. 635, 641.

of the term "negligence" a tort which by its very nature is not committed through negligence, but would also cause the term "personal injury" to encompass a type of injury which does not appear to be within the purpose of the Jones Act. We submit that the damages ordinarily flowing from torts such as false arrest or imprisonment, malicious prosecution, libel, slander, etc., are not the type of "personal injury" or "death" for which the Jones Act was intended to afford a means of redress, but are to be distinguished from physical harm resulting from violence inflicted upon the person of an employee by a fellow employee or a superior acting in the course of his employment. In the latter situation (under the reasoning of this Court in the *Jamison* case), the injury is said to occur through negligence, "As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act." 281 U. S. at p. 641. It is clear that such considerations are not involved in the wrongs and damages here complained of, and that there is no justification for petitioners' supposition that by broadening the term "negligence" to include an assault committed in a particular circumstance, this Court intended that thenceforth the term should embrace every form of tort liability no matter how remote from or unrelated to the common law concept of negligence.

2. Apart from the Jones Act, petitioners (Br. pp. 4-5) seek to sustain the admiralty jurisdiction of the District Court by characterizing the alleged wrongs as maritime torts, even though their arrest and imprisonment did not occur either on navigable water or in the performance of their duty, but on the contrary occurred while they were on shore leave at Bari, Italy.

The contention is clearly contrary to the historic rule that the locality of the tortious injury is the test of its maritime nature (*The Plymouth*, 3 Wall. 20), and that for purposes of admiralty jurisdiction the injury, in order to be maritime, must arise upon navigable waters. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 40, 41; *The Plymouth*, supra; *Smith & Son* v. *Taylor*, 276 U. S. 179; *Cleveland Terminal R. R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *The Troy*, 208 U. S. 321; *Martin* v. *West*, 222 U. S. 191; cf. *The Blackheath*, 195 U. S. 361. For specific holdings as to the non-maritime nature of arrest and imprisonment consummated on land, see *Thomas* v. *Lane* (1834) (C. C. D. Me.) 2 Sumner 1, Fed. Cas. No. 13,902, and *Bain* v. *Sandusky Transportation Co.*, 60 Fed. 912 (E. D. Wisc.); cf. *Kamara* v. *S. Livanos & Co.*, 97 F. Supp. 435 (S.D. N.Y.).

Petitioners contend, however, that the locality of the injury or damage is no longer determinative of the maritime character of the tort, and therefore is not now determinative of admiralty and maritime jurisdiction. In support of this contention, petitioners rely on this Court's decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, which

held that a seaman who sustained personal injuries occurring in the course of his employment while ashore, had a right of recovery under the Jones Act. In support of their contention, petitioners lift from its context an incomplete quotation of this Court in that case (Br. p. 5). But the partially quoted statement, when read in full, shows on its face that it was expressly directed to the "right of recovery in the Jones Act," and not to the matter of general admiralty jurisdiction.[6] Moreover, this Court in that case (at pp. 40-41) plainly recognized that jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters, and does not include personal injuries occurring on land, pointing out that "maintenance and cure" was the important exception to the general rule (p. 41), since some of the grounds for recovery of maintenance and cure might involve torts (p. 42). The *O'Donnell* case involved only the statutory modification of prior maritime law by the Jones Act which, in terms, gives to a seaman the right to recover for injuries sustained in the course of his employment wherever they occur, including those sustained while temporarily working ashore—a right which the Court found not to be precluded by con-

---

[6] The full statement of this Court reads as follows (318 U.S. 42-43):

> The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

stitutional considerations. We respectfully submit that there is no basis for petitioners' contention that the holding in that case was intended to or did modify the traditional locality test for purposes of determining admiralty and maritime jurisdiction in suits not arising under the Jones Act.[7]

That the *O'Donnell* case was not intended to alter the general maritime law beyond the scope of the Jones Act is further evidenced by the Admiralty Extension Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. (Supp. V) 740, wherein Congress extended the admiralty and maritime jurisdiction to all cases of damage or injury to person or property caused by a vessel on navigable water, "notwithstanding that such damage or injury be done or consummated on land."[8] Thus, the issue whether the general admiralty jurisdiction prior to June

---

[7] Contrary to petitioners' assertion (Br. p. 4), there is no conflict between the decision in the instant case and *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 55 (C.A. 2). In the latter case the question was whether a longshoreman injured ashore because of the unseaworthiness of the ship's gear had an action for indemnity against the ship owner. As pointed out by the court below in its consideration of petitioners' motion for rehearing (202 F. 2d 253), the injuries in the *Strika* case arose from the unseaworthy condition of the ship, a matter traditionally cognizable in admiralty but a factor not involved in the instant case. Therefore the *Strika* case has no relevance to the question here involved.

[8] In its application to the United States, the 1948 Act is prospective except as to causes of action "where suit has not been hitherto filed under the Federal Tort Claims Act" (46 U.S.C. (Supp. V) 740). *United States* v. *Matson Nav. Co.*, 201 F. 2d 610 (C.A. 9). Since false arrest and imprisonment are excepted from the operation of the Federal Tort Claims Act (28 U.S.C. 2680 (h)), this Act is of no avail to petitioners, the injuries of which they complain having occurred prior to the 1948 enactment. See S. Rep. No. 1593, 80th Cong., 2d Sess.

19, 1948, included torts committed on land, has lost whatever importance it might otherwise have had.

CONCLUSION

The decision of the court below is clearly correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

JOHN R. BENNEY,
SAMUEL D. SLADE,
JOHN G. LAUGHLIN,
Attorneys.

MAY 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 283168 1953